VIRGINIA LAW REGISTER

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Common-Law Pleading Once More.

When the Editor in Chief recovered from the comatose condition to which he had been reduced by the sledge-hammer blows of our valued contributor, Professor C. A. Graves, administered in the January number of the REGISTER, he slowly asked himself these questions:

First: Where, when and how did Professor Graves gather from our editorial the idea that the *teaching* of common-law pleading in a Virginia law school was attacked, or even called in question?

Second: In what way did that editorial speak rudely or with contempt of "demurrer and traverse," except in a loosely constructed sentence coupling them with "other long-forgotten subjects?" In regard to this last matter we beg to say that we have never "spoken disrespectfully even of the equator," and we are woefully aware that "demurrer and traverse" are today very live wires and far from forgotten. As long as common-law pleading is used in Virginia it must of necessity be taught in our law schools, and we wish to add the hope that as long as it is taught it may have as able, clear, learned and forceful a teacher as it now has in the University of Virginia. Our attack was at the thing itself and our regret was that it had to be taught in all of its "subtlety" when the far simpler, clearer and less complicated method of bringing right and wrong to a settlement at the bar of justice had been tried and found sufficient by that great country to which we owe alike our jurisprudence, our language and our love of liberty, law and order.

The idea of "censuring" our distinguished friend never entered our heads and we defy the most captious to find a suggestion of censure as to him or any other law teacher in our editorial. We did not contend in any way, shape or form as to anything connected with the teaching of the subject in our Uni-

versity—or as to its being made elective or otherwise. It must be taught as long as it is needed in our courts. It is the "thing taught," not the teaching of it, which formed the basis of our attack. We have opposed the continuance of common-law pleading for some years now. A chance visit to the lecture room whilst "demurrer and traverse" were being discussed, recalled sharply to our minds the rest of the system, and ghosts of the Writ of Right, the Writ of Formedon, the Quod ei Deforceat arose, accompanied by the half-dead figures of "sur-rebutters," replications, rejoinders and others of that ilk now relegated to a line on the order book. Our effort was, and will be, as long as we are able to arouse a sentiment amongst the profession to have common-law pleading as it now exists abolished in Virginia. We have not found advanced in the witty and entertaining article of our friend a single argument which has convinced us that we are wrong in this. Indeed the only argument advanced is one made by Ambassador Bryce, that this system gave to the intellects of many generations of lawyers a very sharp edge and impressed upon them the need of distinguishing issues of law from issues of fact. The intellects which needed this sort of training to that end must have been very blunt indeed and we prefer broadness of intellect to sharpness. We never knew a great common-law pleader—and we believe we have known some of the best in this country—whose mind was not narrowed rather than broadened by the science. They too often overlooked the "issues of fact" in the desire to have the statement of the facts reduced to a fixed formula, and the result was often a game of skill at form, rather than a great test of the principles of right and justice. The "pleading was the thing," they set to "try and catch the conscience of the king," and the rest "might go hang." Time and again in a practice now entering upon its thirty-eighth year we have seen causes delayed, time and money wasted, the court's calendar clogged, justice and right imperiled because of this wonderful system. Hours wasted arguing over questions of pleading when the very right of the case was apparent to the court, the counsel, and even to bystanders unlearned in the law! Our old friend, the "demurrer," came in because the rigid frame work of an ancient formula was not followed and technicality prevailed over justice, formula over right.

If to try and prevent this condition is to have a contempt for "learning," to demand something "practical" and change the law from a profession to a trade, then we plead guilty. Better an honest trade than a profession in which the trickster is more likely to succeed than the honest, straight forward man, and in which the roads of truth are so beset with traps and pitfalls that no man can feel safe in his journey to the right until he has learned a mystic Cabala, for whose correctness, he himself cannot always vouch, no matter how learned he may be.

Nor do we say these things unadvisedly. Let the learned professor take the reports of our Supreme Court of Appeals—a tribunal than which no higher, purer, abler body existed or exists—and let him note the cases reversed, dismissed, sent back, upon mere technical questions of pleading, when the "issues of law" and "issues of fact" were as apparent as the noonday sun. But the hands of the court were tied. They could only construe and carry out the law as they had it—not change or make it—and the system in which we lawyers have been bred made us submit in silence.

Nor can all this be laid at the door of the ignorant pleader. In some cases, which no doubt the learned professor often cites in his class, the faulty pleading was drawn by the ablest counsel at the bar. That counsel was often entangled in cobwebs until his vision was blinded. His training had taught him to look for the countless objections which might be made to a simple statement of fact, when couched in legal phraseology. And so count was heaped upon count; and to meet his array demurrers and pleas innumerable were brought into play, and pawn after pawn sacrificed upon the chess board until at last the umpire called a halt and pronounced a "checkmate," and then only the real game began. Finding out how the case ought to be stated was given a greater prominence than how the case ought to be decided.

The uselessness of all the cumbrous common-law pleading can be in no way better demonstrated than by the tremendous growth of the use of the notice, which has practically abolished debt and assumpsit, covenant and all actions upon contracts for the payment of money. The simple, plain statements in a bill in chancery bring up all questions of "issues of law" and "issues of fact," and there can be advanced no valid reason why every dec-

laration at common law should not be as simply stated and the pleading be as simple as in chancery.

And now as to the personal element in connection with the attempted reform. It is true that the Editor in Chief has been chairman of a committee of the Bar Association to attempt a reform in pleading, but the learned professor is mistaken in supposing that the committee has never been "called" together. Two attempts were made to "call" it but it never came. "They all began with one consent to make excuse," with the exception of Professor Graves, who, when the subject of a meeting was suggested orally to him, expressed his readiness to meet with the committee at any time. He has doubtless forgotten this.

At the meeting of the Bar Association in 1908 the matter, as Professor Graves states, was laid over until 1909. Our Editor in Chief, when the Association met this latter year, was unable to attend, being so ill that the only plea it was thought for some time he would ever again make would be one of "confession and avoidance" at the great Court of Last Resort. In 1910 he was in Europe. In 1911 he and Mr. Patteson were the only members of the committee present, and as nearly every important question which came before the Association was settled by a vote of seven to eight or nine to six, he came to the conclusion that there was little need of trying to do anything with that body, for the Association as at present conducted has really no time and less inclination to discuss "weightier matters of the law." The business meetings are held after the conclusion of long addresses or papers, when the members do not feel like protracting the session, and the allurements of the delightful social features prove more attractive than learned or unlearned discussions. Our Editor got leave to print and at this very moment is gazing upon a mass of undigested matter in the shape of notes and sections and suggestions, and is wondering how he is to find the time in the midst of a busy practice—and editing the REGISTER—to lick into shape the result of some three years' study. And so he has "appealed unto Cæsar." He does not believe the Bar Association would trouble itself to have read any bill he would draw, or take the time to discuss it, and he doesn't blame that body. The fact is that if the present decline of business in the common-law side of our courts continues we will have no need of common-

law pleading in a few years. Litigants are learning that litigation as at present conducted doesn't pay. The law's delays, the uncertainty of results, the procrastination which has ever been a mark of our easy-going profession are reaping their reward. Wise men pay their lawyers now as the Chinese do their doctors.

If the Legislature now in session will only pass the bill which is before it, permitting actions for torts to be brought by notice, as actions for money are now brought, the reform is hardly needed; and if the right to bring *all* actions on torts or contracts by notice is allowed, as it should be, then common-law pleading would be, if not abolished, very soon disused; for the system would quickly work itself into shape, lawyers, courts and legislatures aiding therein.

In conclusion we cannot allow the occasion to pass without assuring our distinguished friend that nothing was further from our mind than censure of his teaching, or in other respect. To slightly change his favorite poet we would say:

"Now by the pow'r which good men saves,
Thou art a dainty chiel, O Graves,
Whae'er o' thee shall ill suppose
They sair misca' thee,
I'd take the rascal by the nose
Wad say, shame fa' thee."

Should Law Be Taught in Any Law School—For a Few Years at Least?

This rather startling question is not addressed to Professor Graves nor has it any bearing upon pleading. It is called forth by the perusal of a very remarkable, very saddening (and we trust very inaccurate) little book reviewed elsewhere. According to this book only two per cent of the lawyers in this country are earning $25,000 per annum and over; six per cent do no make over $10,000; thirteen per cent range from $5,000 to $10,000; twenty-five per cent, from $2,000 to $5,000. In other words fifty-nine per cent of the lawyers of this country make less than $2,000 per annum; and yet the number of law students in the United States has increased from fourteen thousand five hundred in 1900 to twenty thousand in 1910, whilst the

population of the United States has only increased about sixteen million. The increase in law students has been over thirty-three and a third per cent in the decade, whilst the increase in population has been less than twenty per cent. Over fifteen thousand lawyers are being turned out of the law schools of this country every twelve months. If these figures are correct—and we are not able to contradict them—then the old problem as to what becomes of the pins is an easy one in connection. Should not some wise Malthusian plan be devised to check this fecundity on the part of those responsible for this state of affairs? It may be that some of these students are studying law for the reasons given by "dear old John B.," as we still love to call him, and which are set forth at length in Minor's Institutes, volume 1, pp. 2 to 8. Let us hope that some of them are merely men of wealth, jurors, justices of the peace, physicians, clergymen and men of affairs, and have no idea of entering into the mad scramble with the fifty-nine per cent of impecunious ones. But there is a note of hope behind all these despairing figures, and we do not wish too quickly to discourage the student or the young practitioner. If we compare the legal profession with the other professions it certainly offers a better field than the ministry, from a pecuniary point of view; the doctors are growing discouraged, for the number of medical students in the decade from 1900 to 1910 has decreased from twenty-two thousand to seventeen thousand. We do not believe the average engineer, either civil or mining, would rank as high as the average lawyer, whilst artists and actors would be found far below the average income. It must be remembered also that law is an avenue by which the highest points of statesmanship are reached, and if we would add the income which the average lawyer-politician makes, it would decidedly bring up the general average. In spite of the book we mention, law is a noble profession if nobly followed, but we ask the great reformers of today whether their attention ought not to be called to this alarming increase in candidates for starvation. We might suggest that no man ought to be allowed to practice law until he had obtained a degree in a first-class law school; that the term for such a degree ought to be extended to five years; and that in addition to the present rigid examination he should have a certificate from a board of

physicians that his health and general physique are first class and that a little starvation for a few years would not imperil his existence. Or we might borrow from the English Premier Asquith's Servants' Bill and pass a law that each lawyer should be provided with a card upon which both he and each client should affix a stamp obtained from the Government when any fee is paid, the cards to be turned in when filled and the proceeds used to establish an old age pension fund for the aged and impecunious members of the profession.

Workman's Compensation Acts.

Eleven States of this Union have passed such acts. In three—Washington, Wisconsin and Massachusetts—the law has been declared constitutional. New York has declared the act unconstitutional. Both the New York and Washington statutes contain practically the same principle, though in the former the employers are made directly liable to their workmen for injuries sustained, contributory negligence to the contrary notwithstanding, and in the latter an insurance fund is accumulated under the control of the State, to which employers contribute and from which injured workmen are paid. We thus have practically the same law held valid in one State and invalid in another.

The Washington case is exceedingly interesting, not only upon the points raised, but as indicating how soon the courts follow the lead of the Supreme Court of the United States. Four objections were made in this case of State ex rel. Davis-Smith Co. *v.* State Auditor, against the constitutionality of the act:

1st. That it deprived person of property without due process of law;

2nd. That it granted immunities to a class of citizens which did not belong equally to all citizens;

3rd. That property was not taxed according to its value in money and the tax was not equal and uniform;

4th. That it violated the right of trial by jury.

The police power settled objection number one, and the Supreme Court of the United States in numerous cases, and especially in the Oklahoma Bank Guaranty Law was quoted as

sustaining the law. Section 4585 of the Revised Statutes of the United States was also cited as sustaining authority—upon what principle we have not been able to ascertain. Number two was held to be doubtful in part, but the Court declined to pass upon some of the objections until the act had been further administered, holding that these provisions, even though they were faulty, could be stricken out without destroying the act. Number three was overruled on the ground that the forced contribution from the employers was not a tax, but was in the nature of an excise—taking the cue from the Supreme Court of the United States in Flint *v.* Stone Tracy Co., 221 U. S. 389. We may therefore expect the "license" feature to occupy very soon equally as prominent a place as our old friend the "police power."

The practical elimination of the jury trial as objected to in number 4 was made short shrift of in a lengthy discussion. The State had the right, said the Court, to make it a condition of the contract between the employer and employee that the latter shall accept a fixed sum for any injury he may receive, and the Constitution of Washington not having defined what shall constitute a cause of action (did any constitution ever do this?) it was left to the Legislature to say what was, and the Legislature had an equal right to say what was not. "Ergo," as the grave digger said in Hamlet, the right of trial by jury was not involved in this case, there being no cause of action against the employer, but only against the fund. The Court refers to the New York case overruling a law similar in principle, but declines to concur with it.

Testing a Proposed Law before Enactment.

The grand old Commonwealth of Massachusetts does not wait to have the constitutionality of an act decided after its enaction. The Senate of that State ordered that the opinion of the Supreme Court be required as to whether its Workman's Compensation Act was constitutional, both from a State and Federal standpoint, before they passed it, and that Court declared very properly that the rules of law as to contributory negligence, the assumption of risk by a fellow servant, and the negligence of a fellow servant were practically "rules of court," and the Legislature

might change or abolish them as defenses if it saw fit and that the act was unimpeachable both from a State and Federal standpoint. This act contained the compulsory insurance fund feature.

We commend to our law-making body this Massachusetts rule. Why should not the Legislature refer any important change in the law, or new law, to the Supreme Court for its decision upon its constitutionality, instead of compelling suitors or defendants in court to waste time and money in testing the law before that body? There is every reason for it, and we can see none against it. If it be thought that a constitutional amendment is necessary for that purpose, let us have it passed. But we do not believe it necessary.

We are glad to see the following bill proposed in the Virginia Legislature and we sincerely hope it may become a law.

A Valuable Bill in Regard to Testimony of Plaintiffs or Defendants in Actions at Law or in Chancery.

"A bill to prescribe the order in which testimony shall be taken and introduced in any trial, action or suit in the Circuit and Corporation Courts:

"Be it enacted by the General Assembly of Virginia that no person shall testify for himself in chief in any criminal trial or action at law after introducing other testimony for himself in chief, nor in any suit in chancery after taking other testimony for himself in chief, in any trial, proceeding, action or suit in the Circuit or Corporation Courts of the Commonwealth of Virginia; provided that this act shall not apply to any trial, proceeding or action or suit instituted before it became a law."

Whilst we do not agree with the pessimists that there is a large amount of perjury in every case brought into court in which there is a contest, we do believe that the inducements towards perjury are increased by the laws which allow parties in interest to testify as well as the law allowing the testimony of husband and wife. Anything therefore which has a tendency to check this possibility and to prevent suitors in court being led into temptation is most excellent.

This bill, of which the Honorable John W. Chalkley is the patron, goes a long way to prevent the memory of suitors in court from being affected by the testimony of other parties, ei-

ther for or against them. An act similar to this has been the law in several of the States of the Union for some time, and we sincerely hope that the Virginia General Assembly may pass the present one.

New Rules of the Supreme Court of the United States.

New rules of the Supreme Court of the United States were promulgated December 22, 1911. In addition to the reduction of time for argument referred to in our January number, the new rules require briefs or printed arguments to be accompanied by satisfactory proof of service upon counsel for the adverse party before being filed with the Clerk of the Court. This is said to be designed to avoid the delay caused heretofore by counsel appearing before the court unprepared to answer arguments of the opposing side. The court has indicated an intention to refuse supplemental briefs except in unusual instances. A new rule has been made to reduce the size of transcripts of records and bills of exceptions. If neither party is prepared when a case is called the case is continued to the next term of the Court instead of being placed at the foot of the docket as formerly. Briefs must be filed at least six weeks before the case is called for hearing, instead of three weeks, by the plaintiff in error or appellant, and one week instead of three days by the defendant in error or appellee. Thirty copies of printed arguments or briefs must be filed instead of twenty-five. Other slight changes in the wording of the rules are made necessary by the new judiciary act of March 3, 1911. The exceedingly large number of cases on the docket and the necessity for facilitating the business of the court has led to the invention of the summary docket and memorandum opinions. The summary docket will contain cases which do not justify extended argument. Hearing of the causes on such docket will be expedited, the court providing from time to time for such speedy disposition of the docket as the regular order of business may permit. Memorandum opinions break away from the traditional discussion at length of illustrative cases but state briefly the conclusions of the court. Several of the opinions handed down during this term cite no authorities.